BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

1. Jurisdiction

The facts with regard to jurisdiction have been set forth in the foregoing petition.

2. Statute and Regulations Which Are Involved Herein

The Selective Training and Service Act of 1940 provides in Section 5, subdivision (d), as follows:

> "Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act, shall be exempt from training and service (but not from registration) under this Act."

The regulations issued under this provision provide as follows:

> "622.44 Class IV-D: Minister of religion or divinity student.
>
> (a) In Class IV-D shall be placed any registrant:
>
> (1) Who is a regular minister of religion, or
>
> (2) Who is a duly ordained minister of religion.
>
> (b) A 'regular minister of religion' is a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member, without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister.
>
> (c) A 'duly ordained minister of religion' is a man who has been ordained in accordance with the cere-

monial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties."

"626.2 *When registrant's classification may be reopened and considered anew.* (a) The Local Board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any interested party in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (Form 150) unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

(b) At any time before the induction of a registrant, the Local Board shall reopen and consider anew such registrant's classification upon the written request of the State Director of Selective Service or the Director of Selective Service."

3. Statement of the Case

The basic facts have been stated in the foregoing petition. Certain other facts will be called to the attention of the Court, particularly in the point discussing the evidence before the Draft Board.

4. Summary of Argument

a. The Circuit Court of Appeals erred in holding that the action of the Draft Board could be sustained although not supported by substantial evidence.

b. The Circuit Court of Appeals erred in holding that a duly ordained minister is not entitled to exemption unless he is also a regularly functioning minister.

c. The Circuit Court of Appeals erred in holding that there was evidence before the Draft Board to justify a denial of petitioner's claim for exemption.

d. The Draft Board improperly abdicated its function to a panel not vested with any authority by law.

e. The decision of the Draft Board was improperly sustained on the basis of material which was not before the Draft Board at the time it reclassified petitioner.

5. Argument

POINT I

The Circuit Court of Appeals erred in holding that the action of the Draft Board could be sustained although not supported by substantial evidence.

This case marks a new stage in the relinquishment to the executive of the judiciary's traditional concern with the facts, as well as the law, of controversy. The course of that relinquishment has, heretofore, been limited by a measure of judicial supervision over the facts, here abandoned by the Circuit Court, a supervision which finds expression in the substantial evidence rule. This Court has found it wise so to interpret the congressional mandate that the factual decisions of various expert administrative

bodies should be final. It has reached that conclusion in situations involving property rights alone, where the person affected was represented by counsel, where there was a hearing at which witnesses were subject to cross-examination, where the fact-finding body was expert and where it was required to formulate its conclusion with precision. The rule has been applied to findings of the Interstate Commerce Commission, *Interstate Commerce Commission* v. *Union Pacific Railroad Company*, 222 U. S. 541, *Florida* v. *United States*, 292 U. S. 1, of the Board of Tax Appeals, *Helvering* v. *Rankin*, 295 U. S. 123, of the Secretary of Agriculture, *Acker* v. *United States*, 298 U. S. 426, of the National Labor Relations Board, *Consolidated Edison Company* v. *National Labor Relations Board*, 305 U. S. 197, and of the Federal Trade Commission, see *Federal Trade Commission* v. *Reladam Co.*, 316 U. S. 149.

The rule has been defined by former Chief Justice Hughes: "Substantial evidence is more than a mere scintilla. It means such relevant evidence that a reasonable mind might accept as adequate to support a conclusion" (*Consolidated Edison Company* v. *National Labor Relations Board*, *supra*), and by the present Chief Justice: "It must do more than create a suspicion of the existence of the fact to be established" (*National Labor Relations Board* v. *Columbian E. & S. Co.*, 306 U. S. 292).

There is nothing in any of the opinions of this Court to suggest that the substantial evidence rule is to be applied in review of one kind of administrative decision and to be ignored in review of a different kind. There is no basis in these opinions for reaching a conclusion that the substantial evidence rule should not be applied in cases arising under the Selective Training and Service Act. Indeed, one would suppose the rule to be particularly applicable to these cases, cases involving not the great corporations whose names figure in some of those just cited, but persons of humble condition, cases involving not merely dollars and cents, but liberty, perhaps life itself. One would sup-

pose this all the more since in these draft cases the individual affected is denied the right to representation by counsel and is given no hearing in the traditional sense, since in these cases the tribunal which passes on his fate is not an expert one and is not required in any way to formulate the grounds of its conclusions. And, with the exception of the case at bar, all the circuit courts before whom the issue has arisen have taken this for granted.

The rule has been so stated in the Fourth, Sixth, Seventh and Eighth Circuits in cases cited on page 11, supra. Perhaps the best formulation is that contained in *Johnson* v. *United States*, 126 F. 2d 242 at 247, where the Court said:

> "No such board can bind a registrant by an arbitrary classification against all of the substantial information before it as to his proper classification. • • • A classification made in the teeth of all the substantial evidence before such agency is not honest but arbitrary. Courts can prevent the arbitrary action of such agencies from being effective."

This rule was recently followed by Judge Hartigan in the District Court of Rhode Island in *United States ex rel. Rubin* v. *Magruder*, 55 F. Supp. 947. He there set aside the withdrawal of exemption of an Orthodox Jewish student of religion based on the action of the same panel on theological matters as is involved in the case at bar. Judge Hartigan held that since the substantial evidence showed that the registrant was entitled to exemption, the Board's change of classification was arbitrary and could not be allowed to stand.

The Circuit Court in the case at bar advanced two reasons for refusing to follow the other circuits. It believed that the informal character of Draft Board proceedings required this result; it thought the substantial evidence rule not applicable to deportation proceedings which it deemed analogous (185-188). The first ground is shockingly unjust; the second proceeds on a misconception of the law.

The notion that the informality of the Draft Board proceedings permits a relaxation of judicial safeguards lacks all equity. The powerful corporation, represented by eminent counsel, having the right of cross-examining witnesses, is finally afforded judicial scrutiny of the evidence heard by an expert tribunal in order to make sure that that corporation will not be required to pay out its money unless there be substantial evidence which supports the administrative decision. But the poor draftee, deprived of assistance of counsel, confronted by no witnesses, judged by a tribunal without expert qualifications, is denied this judicial scrutiny, although he may lose his life in consequence. And this denial is here justified by the very handicaps he labors under before he becomes entitled to judicial relief! Such a result smacks of the maxim, "To him that hath shall be given, from him that hath not shall be taken away". That maxim may be a truthful reflection of what happens in a harsh world. It has no place in the thinking of an American judge. No. The handicaps under which a person labors because of the informality of the Draft Board procedure require more, not less, judicial protection.

The notion that the substantial evidence rule should not be applied to draft cases because it is not applied in deportation proceedings rests on two errors. In the first place, there is no analogy between the two kinds of proceedings, since a person served with a deportation warrant has the right to representation by counsel, is afforded a real hearing, and is finally judged by an expert body. In the second place, there is no foundation for the belief that the substantial evidence rule does not govern deportation cases. This Court has never so decided, although it is true that the term "substantial evidence" is not found in the early cases.

The Circuit Court (188) cited five deportation cases decided by this Court in support of its conclusion: *Chin Yow* v. *United States*, 208 U. S. 8; *Tang Tun* v. *Edsell*, 223 U. S. 673; *Nishimura Ekiu* v. *United States*, 142 U. S. 651;

United States v. *Ju Toy*, 198 U. S. 253; *Tisi* v. *Tod*, 264 U. S. 131; *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103. It is significant that all of these cases were decided before the substantial evidence rule had become firmly established in the law. However, in the *Vajtauer* case the present Chief Justice implied that this rule (which had been foreshadowed in the *Union Pacific* case, *supra*) was applicable in deportation as well as other cases, for he rejected one item of evidence as having no "substantial" bearing on the issue there involved. The Circuit Court also cited *Silberschein* v. *United States*, 266 U. S. 221, a case arising under the War Risk Insurance Act. That case, however, does not discuss this subject at all and was likewise decided during the period when the substantial evidence rule was in process of formulation.

The Circuit Court (188) further cited *Bridges* v. *Wixon*, decided by the Ninth Circuit on June 26, 1944, and not yet reported, and other deportation cases there cited, as support for the proposition that the administrative finding would be upheld if there was any evidence to support it. In a decision denying an application for rehearing that Court, however, repudiated the notion that the administrative decision could be sustained if supported by a mere scintilla of evidence. While the term "substantial" evidence was not used in the opinion, it is fair to infer that the Court meant to imply that substantial evidence was necessary.

Surely there is no room for the making of nice distinctions between "scintilla", "any" or "some". The notion that a finding, whether of a judge, jury or administrative agency, can be supported by evidence which is lacking in substance has no place in our law. The evidence must be such as to satisfy the reason; it must be substance, not shadow. So this Court has repeatedly held. Surely the divergence from the general rule which has occurred in the case at bar requires full consideration by this Court.

POINT II

The Circuit Court of Appeals erred in holding that a duly ordained minister is not entitled to exemption unless he is also a regularly functioning minister.

Petitioner claimed that he was both a regular and a duly ordained minister (6) and that he was entitled to exemption if he was either one or the other (7). The statute in express terms creates two categories of exemption: "Regular or duly ordained ministers of religion" are declared exempt.

The Circuit Court of Appeals has in effect stricken the words "duly ordained" from the statute. For it has held that ordination alone does not confer exemption. It bases this conclusion on the regulations which were issued under the Act (622.44, *supra* p. 15). These regulations also in effect eliminate the exemption based on ordainment. For a regular minister is defined to be a person who customarily preaches and teaches the principles of a recognized sect, although not formally ordained, so long as he is recognized by such sect. The definition of ordained ministers is identical except that it substitutes ordainment for recognition by the sect. Obviously, however, ordainment *per se* constitutes recognition by the sect, so that an ordained minister fully comes within the definition of a regular minister contained in the regulations.

In the case at bar there has never been any question about the fact that petitioner was recognized by his sect. A certificate to that effect was filed with the Draft Board on August 1, 1941 (23, 36). Additional certificates were filed with the Appeals Board somewhat later (9-12). Petitioner was supported in his claim to exemption by five rabbis of his sect who appeared before the Draft Board and none others appeared (18, 28, 34, 43, 48). If, therefore, the view taken by the Circuit Court be the correct one, the only other issue which should have concerned anyone in the case was whether or not petitioner was actually

functioning as a rabbi. In view of the conceded fact that he was vouched for by his sect, the question of his ordination would have been wholly immaterial.

Yet the greater part of the proceedings both before the Draft Board and the Court were concerned with the fact of ordination. It was this fact with which Rabbi Leiter was concerned in the fall of 1941, for he expressly said that since petitioner was ordained "his particular standing with Congregation Tifereth Zion Anshe Sfard is of no consequence in this matter" (38). Following this certification that petitioner had been duly ordained, the Draft Board granted petitioner an exempt status (16). The panel gave considerable attention to relator's ordination (126-128, 139, 140). It was, indeed, its chief concern* (106, 107). The only matter with which Mr. Goldman of the Draft Board concerned himself at the hearing in December, 1943, was the question of ordination (28, 34, 43, 72, 87, 89, 114, 116). It is particularly significant that the question of petitioner's activities as a rabbi was not brought up for discussion at all on that occasion (89, 116).

Likewise, at the hearing before the Court a great deal of the evidence was concerned with this question of ordination (34-47, 81-88, 94, 95, 97, 98, 108-117). Both at the Trial Court and in the Circuit Court of Appeals petitioner took the position in argument and briefs that he was entitled to exemption if he was an ordained minister without regard to the performance of functions, while, of course, also claiming that he had in fact performed such functions. This basic contention was not disputed by the respondent either in argument or briefs. It is evident from the foregoing that until the decision of the Circuit Court it was never supposed by anyone that if petitioner established his ordination he would not be entitled to exemption.

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* Rabbi Goldstein clearly intimated that he was not at all concerned with the functions which petitioner performed, for he said: "Unfortunately there are many people who do that, who are not ordained rabbis" (107).

The Circuit Court of Appeals (189) in support of its conclusion suggested that Congress exempted ministers because of the need of the public for spiritual guidance. There is nothing on which to rest such a supposition. Had Congress been concerned merely with the necessity for supplying congregations with spiritual leaders, there would have been no need for exempting all ministers. That necessity would have been satisfied by placing on the Draft Board responsibility for determining to what extent ministers were needed in particular places and giving only those occupational deferment. It is rather to be supposed that Congress granted exemption because it believed it incompatible with the character of an ordained minister that he should be required to perform military service.

Is it to be supposed that an ordained minister of religion would be denied exemption because he happened to be unemployed? We submit that the question of the functions performed by the minister have no bearing at all on his right to exemption. They would become relevant only if a contention were made that a minister ordinarily entitled to exemption had lost that exemption because, by reason of his activities in other directions, he had in effect abandoned the ministry. No such contention was or could have been made in this case.

The Circuit Court cited *In re Rogers*, 47 F. Supp. 265, and *Ex Parte Stewart*, 47 F. Supp. 415, as cases that followed the regulations. However, in neither of these cases was there any substantial evidence that the draftee had been ordained, so that in those cases the issue here presented did not exist. The Circuit Court, therefore, is the first court to have rendered meaningless the word "ordained" so carefully put into the statute by Congress. We believe that this is contrary to the intention of Congress and certainly is a question which should be finally decided by this Court.

POINT III

The Circuit Court of Appeals erred in holding that there was evidence before the Draft Board to justify a denial of petitioner's claim for exemption.

This issue is important not because of the fate of petitioner as an individual, but because it searches the integrity of administrative and judicial processes in wartime. For it has always been supposed that it was fundamental to the American way of life that no one could be deprived of his liberty on a determination which ignored all the evidence and which rested on surmise or prejudice. Yet while the decision in this case stands, these basic postulates are in doubt.

It must not be forgotten that petitioner's claim to exemption had been twice sustained by the Draft Board. The first time it was sustained following an investigation made by a rabbi of the Board's own choosing who certified that petitioner had been duly ordained (38). The second time it was sustained following complaints about the exemption (65, 66).

The Draft Board could reach a conclusion other than the one twice adopted by it only on the basis of new facts. The regulations expressly so provide (626.2-a, supra p. 16). They cast on the Board a burden of inquiry which it did not fulfill. There were three issues on which the Board might have been expected to make inquiry; whether petitioner had been duly ordained; whether, if not ordained, he was supported by his sect*, and whether he was functioning as a rabbi. We submit that the Draft Board did not perform the duty imposed on it by law. It made no investigation. It conducted no inquiry. It abdicated its function to the so-called theological panel, a body not sanctioned by the law nor provided for in any regulations.

* Of this there never was any question here.

And, as we shall show, the conclusion arrived at by the panel was in complete disregard of the evidence.

It is petitioner's contention, moreover, that the action of the Draft Board was motivated in large measure, not by a consideration of the facts of petitioner's ordination and functioning, but by the Board's belief that petitioner was not entitled to exemption because of his interest in the law and because of the answers elicited by one of the members of the panel with regard to certain matters of rabbinical knowledge. Because no findings were made by the Board, this contention can be established only by an examination of the testimony of Mr. Goldman and Rabbi Goldstein. Mr. Goldman, the only member of the Draft Board who testified, when first called upon to justify the refusal to continue the exemption, said:

> "It seemed to us that he was more inclined to follow the law than to establish himself as a rabbi" (42);

and Rabbi Goldstein, the only member of the panel who testified, said:

> "We found him to be interested in law" (97).
> "I felt that he did not know anything * * *. The boy did not understand" (98).

Rabbi Goldstein also referred to various questions which he had asked petitioner at the time of the panel hearing (138-140) and interpreted these questions and the answers for the purpose of establishing his contention that petitioner was not learned in Hebrew law (98-100).

We submit that it was improper for the panel to question petitioner on these subjects or for the Draft Board to pay any attention either to petitioner's alleged ignorance of Hebrew law or to his completion of his legal studies. Before discussing this we shall first consider the question of petitioner's ordination, then the question of his functioning.

A. The evidence compelled the conclusion that petitioner had been duly ordained.

Petitioner claimed to have been ordained by Rabbis Mendelsohn and Levine and also by his own father, Rabbi Boruch Trainin. He produced certificates of ordination from all three rabbis. Rabbi Mendelsohn was dead, but the other two rabbis who had ordained him appeared before the Board and attested to his qualifications (28, 34, 116, 122). They also testified to like effect before the Court (115, 119, 120). Neither of them was called before the panel.

The evidence which the Draft Board had before it on the question of petitioner's ordination consisted of the following: the communication of September, 1941, from Rabbi Leiter, whom the Draft Board had chosen to investigate the subject, certifying that petitioner was duly ordained (38), and the testimony of five rabbis at the hearing before Mr. Goldman in December, 1943, that petitioner was duly ordained (28, 34). These was no evidence whatever to the contrary.

The only question which apparently arose at the Goldman hearing in December, 1943, was whether or not one rabbi had the right to ordain another (see 72). On this point the Board had originally been informed by Rabbi Leiter, who wrote: "In accordance with Rabbinic law an individual may be fully ordained by another individual rabbi and thus be qualified as a rabbi in Israel" (38). Petitioner explained the Hebrew law on this subject to Mr. Goldman at the December hearing (72), as did Rabbi Savitz (86, 87). Mr. Goldman admitted in court that he had been so advised by petitioner's witnesses (43) and that he had no other information on the subject (44). It is clear from the record (see particularly 44, 45) that the Draft Board could not have reached a conclusion contrary to the views expressed by these rabbis, for it had no other basis on which to proceed. And that these views are correct fully appeared from the hearing in court. The rabbis were all unanimous

that under Jewish law one rabbi could ordain another (83, 95, 113, 122). Even respondent's witness, Rabbi Goldstein, who was a member of the panel, admitted that this was so (101). Clearly, therefore, the action of the Draft Board could not be sustained on this ground.

The only other question which was ever raised related to the form of the ordination certificate. This question, however, was not discussed by Mr. Goldman with the five rabbis who appeared before him. It was discussed at the panel hearing. But the form of that discussion did not constitute evidence upon which the Draft Board was entitled to proceed. Mr. Goldman testified that the Board was of the opinion that the certificates produced by petitioner were not in proper form because they lacked certain words (45, 46). Mr. Goldman in support of his conclusion relied solely on the panel's refusal to certify petitioner* and on certain testimony given before the panel (45, 46). However, what Mr. Goldman referred to did not constitute any evidence whatever in support of his conclusions. Mr. Goldman (45, 46) quoted from the later part of the panel testimony on this subject (139, 140). We quote the earlier part of it:

> "Q. And you tell me that your contention is that these certificates which you have submitted herein contain the conventional words yoreh—yoreh, yodin—yodin? A. Just let me answer that, please.
>
> Q. Yes or no? A. Yes, they do—in spirit.
>
> Q. Not in words? A. No. Naturally, if they aren't there.
>
> Q. Now, then, I see— A. Wait, something else—when I received my semichahs the reason why they did not put the words in there, they said one doesn't necessarily have to put them in. One can give a semichah in his own language" (128).

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* He was, at that time, ignorant of the panel's reasons. These had been embodied in a memorandum (21) which Mr. Goldman did not see until months after this hearing (32).

Petitioner's statement then made before the panel that it was not necessary that there be any particular form of words was not controverted by anyone. Indeed, it is clear that Mr. Goldman, when the rabbis appeared before him in December, 1943, did not inquire into the question of the form of the certificates at all. Petitioner was asked at the trial whether there had been any discussion about the form of the certificates at the December hearing. He said that Mr. Goldman told him and the other rabbis that he had not yet looked into the file (73). Mr. Goldman did not contradict petitioner's testimony on this subject. However, Mr. Goldman admitted at the trial that the five rabbis had voucher for petitioner and had stated that he had been duly ordained. Combining several questions and answers, Mr. Goldman's statement was "The other rabbis urged that he (meaning petitioner) was a duly ordained rabbi" (34).

Before the Trial Court every rabbi who discussed the subject stated that no particular form of words was necessary in order to ordain a rabbi. Rabbi Savitz said: "There is no particular form of words" (83). Rabbi Dushowitz: "There is no particular text to be used" (95). Rabbi Gartenhaus: "Many of them are 'Yoreh-Yoreh', but it is not a rule that it should be" (113). Even Rabbi Goldstein, respondent's witness, agreed that Jewish law did not prescribe any particular form of words, although he claimed that it was the custom of seminaries, "and as a rule, individual rabbis", to use certain words (101). Of course, Rabbi Goldstein had not appeared before the Draft Board.

In the face of the letter from Rabbi Leiter (38), the statements of the five rabbis who appeared before Mr. Goldman (34) and the certificates of the two rabbinical organizations (9, 36, 37), it is inconceivable how the fact of petitioner's ordination could be questioned.

It is evident from the foregoing that the Draft Board disregarded the evidence and, accepting merely the fact of the panel's refusal to exempt petitioner, abdicated the function of decision vested in it by law. Under these circum-

stances its decision was arbitrary and should have been set aside. See *United States ex rel. Rubin* v. *Magruder*, 55 F. Supp. 947.

The Circuit Court of Appeals in disposing of the question of petitioner's ordination indulged in some strange speculations not supported by the record. It suggested (189) that "despite the high character of the gentlemen involved" they may have lent themselves to a fraud by certifying petitioner as competent. There is not the slightest basis for such an inference. It is an affront to the standing of the rabbis who ordained petitioner and to the rabbis and organizations who supported his claim before the Draft Board and the District Court. In reaching this conclusion the Circuit Court made the statement that petitioner's case was not "savory" because he gave varying dates for his ordination—a matter of no consequence whatever, for all that mattered was whether he had been ordained*—and because, said the Court, he seemed able to produce a new certificate "whenever his chances of exemption began to look a little dark" (188). For this remark there is no justification whatever in the record.

Petitioner claimed ordination by three rabbis: his father, Rabbi Mendelsohn and Rabbi Levine. He said that he produced the ordination certificates of the latter two when he originally claimed exemption in August, 1941 (73). This is also established by the letter of Rabbi Leiter, who had been chosen by the Local Board to look into the claim for exemption (16). For he wrote on September 4, 1941, that petitioner's "documents show that he was duly ordained by the Rabbis Jacob Mendelsohn, of Newark, New Jersey, and Alexander Levine, of Brooklyn, New York" (38). The certificate of the father was, to be sure, submitted much later and after the panel hearing (74). But the production of that certificate after the panel hearing could not have

* Petitioner's lapses of memory on this subject could not have been made in order to deceive anybody. They were contained in papers filed by him with the Draft Board from time to time. They could have but hurt, not helped, his case.

helped petitioner at all, since it also did not contain the so-called "talismanic" words. The form of certificate of ordination given by petitioner's father was substantially the same as that of the other two certificates which had already been produced. (See translation of all three certificates, 81-85.) There is, therefore, no basis for the Circuit Court's aspersions on petitioner.

Finally, the Circuit Court said that the action of the Local Board was justified because "certain rabbis asserted" that particular words were essential to constitute proper ordination (189). There were no such "certain" rabbis, or any such single rabbi. No rabbi appeared before the Local Board who made any such claim. Mr. Goldman never so contended. All he said was that he got the impression from a question asked by a member of the panel that such words were necessary (45, 46). But there was no evidence of any kind that Hebrew law required such words.

In view of the uncontroverted facts and the serious misinterpretation of them by the Circuit Court, we respectfully submit that this Court should intervene so that justice be done.

B. With regard to petitioner's functioning as a rabbi.

Petitioner at all times claimed that he was not only an ordained rabbi but also that he was functioning as the rabbi of the Congregation Tifereth Zion Anshe Sfard. He so claimed in his first questionnaire, saying: "I do customarily serve as a minister (159). He so claimed in his occupational questionnaire, saying: "I am the spiritual leader of my congregation" (160) and he there gave the name and address of the congregation (160).

Mr. Goldman, the member of the Draft Board, admitted that petitioner had so claimed before the Draft Board (25, 28). Petitioner had submitted to the Draft Board two written contracts of employment which had been entered into between him and his congregation, one for three years made in August, 1941, the other, a modification and

extension, on December 1, 1943 (47; see also 6). He also furnished programs showing that he had officiated as a rabbi at dedication ceremonies (62). The Draft Board had before it the certificate of the Assembly of Hebrew Orthodox Rabbis dated August 1, 1941, which described petitioner as the rabbi of the congregation (36). Subsequently a certificate was filed by the Federation of Orthodox Rabbis of America which certified that petitioner was the rabbi and spiritual leader of the congregation (37).

Petitioner in his affidavit on which the habeas corpus proceedings rested maintained that he had been continuously functioning as the rabbi (6), saying, moreover: "That I have actually been functioning as a rabbi for over 5 years has not been disputed or questioned by anyone" (7). And that is the literal fact.

The Local Board never made any investigation with regard to petitioner's functioning as a rabbi, although the congregation was less than a mile away from the Local Board's office (47, 48). The only time the Local Board had any contact with any member of petitioner's congregation was in the spring of 1942, following complaints about the exemption previously granted. At that time the president of the congregation was called in. He evidently satisfied the Board concerning petitioner's status, because after interviewing him the Board continued petitioner's exemption (66).

The Board having made no inquiry of its own (see also 26, 28), apparently relied on an inquiry made by headquarters (28). The result of that inquiry, contained in a memorandum of November 17, 1943, was, however, not made known to the Draft Board until March 20, 1944 (21, 22), which was after the mailing of the notice of induction on March 11th and just before the induction itself (20). This memorandum was not relied on by the Board in making its decision withdrawing petitioner's previous exemption (29, 30); nor was it before the Appeals Board (61). We shall show hereafter that the memorandum should never have been received in evidence.

However, there is nothing in the memorandum which would have justified a disregard of all the other evidence. The memorandum itself (168-172)is a composite of information obtained from various sources. It concerned itself primarily with petitioner's study of the law, it in no way contradicted petitioner's contention that he functioned as rabbi of the congregation.

It is evident that the Draft Board was not really concerned with this subject, because Mr. Goldman did not question the rabbis who appeared before him in December, 1943 about it at all (89, 116). He was then concerned only with the right of one rabbi to ordain another (28, 43, 87, 89, 116). Indeed, Mr. Goldman in effect admitted that petitioner had been "functioning", but sought to minimize his activities because the congregation was a small one (42).

Petitioner himself had testified before the panel that he delivered sermons (130, 131), had participated in unveilings (131) and had performed weddings (131, 132). At the hearing before Judge Inch petitioner testified that he had told this to the Draft Board, both to Mr. Schulman in April, 1942 (70, 71) and to Mr. Goldman in December, 1943 (72). Neither of these persons contradicted petitioner. Petitioner and his father both testified before Judge Inch with regard to the functions which petitioner performed as rabbi (66-72, 121, 122).

Despite all of this the Circuit Court said that petitioner never "strongly" pressed his claim that he was functioning as a rabbi and that there was "ample justification" for the Board's action in rejecting this claim (188). We submit that the Circuit Court erred in both respects.

It is true that before the Circuit Court petitioner relied primarily on the fact of his ordination, believing that this alone justified exemption and that it had been conclusively established. In view of the fact that respondent had never questioned petitioner's contention that he was entitled to exemption by reason of his ordination alone, such

a position was a quite natural one. However, the facts with regard to the functions performed by petitioner were called to the Circuit Court's attention both in the original briefs and on the application for rehearing. We submit there is no basis for its conclusion that the Board was justified in rejecting petitioner's contention in this respect.

In the first place, there is no way in which it can be ascertained that the Board actually ever did this. Since the Board made no findings, we can only ascertain the basis for its action from the testimony offered at the hearing before Judge Inch. There only Mr. Goldman testified. It is evident from his testimony that the Board was concerned primarily with petitioner's ordination and not at all with the actual functions performed by petitioner (see discussion at p. 23, *supra*).

The Circuit Court further stated that petitioner's proof on the subject of his functions was "fairly well discredited on cross-examination" (188). The Court referred to an "admission" that petitioner performed only one wedding and could not remember the names of the principals (182). This was a misreading of the record by the Circuit Court. It is true that petitioner had testified before the panel that he had performed only one wedding (132), but that was in response to a question concerning weddings performed for members of the congregation. On the other hand, petitioner remembered the name of the family, Goodwin. Moreover, before Judge Inch petitioner testified about many other weddings which he had performed (75), of persons evidently not members of his congregation, and he specified the name of another family, Berkowitz (76). As he then said, most of those who went to him to be married "were people from the section that I do not even know" (76). There is no basis, therefore, for the suggestion which the Circuit Court made that petitioner's testimony was in any way discredited by the cross-examination.

This cross-examination, of course, dealt with all kinds of absurd details concerning clothing and weather on occa-

sions which there was no reason for petitioner to have fixed in his memory. It reached such a point in the cross-examination of petitioner's father that the Court finally stopped it (124).

We submit that all of the evidence in this case required the conclusion that petitioner was actually functioning as a rabbi. Moreover, in view of the fact that the Draft Board made no findings and that it is, therefore, impossible to determine on what basis it rested its decision, the least which should have been done to protect petitioner's rights was to remit the matter to the Draft Board for the purpose of making its position clear. The Circuit Court suggested that the Board might "without a full picture of the entire situation" disregard the testimony favorable to petitioner "as somewhat colored by interest" (189). We submit there is no basis for the inference that the rabbis and rabbinical organizations were in any way colored by interest. If the picture had not been made sufficiently full the proper way to resolve any doubt would have been to make further inquiry, not to disregard the regulations and reclassify petitioner without proof of new facts and without even hearing him (36). The very least that the Court should have done under these circumstances was to send the case back to the Board. Compare *United States ex rel. Reel* v. *Batt*, 141 F. 2d 845; *United States ex rel. Kornfeld* v. *Cain*, not yet reported, decided September 7, 1944, by Judge Abruzzo in the Eastern District of New York.

C. The Board erred in considering irrelevant matter.

We have already shown that the Draft Board based its conclusion in large part on petitioner's alleged lack of qualifications and on the fact that he applied for admission to the bar.

Neither the law nor the regulations give the Draft Board the right to pass on the fitness of a person to be a minister of religion. To permit the Board or any agency acting on its behalf to do this would result in its becoming in effect

a licensor of ministers. Under the American Constitution religion must remain free from such interference. See *Cantwell* v. *Connecticut*, 310 U. S. 296; *United States* v. *Ballard*, 322 U. S. 78. If the members of a particular sect have chosen an individual to be their spiritual leader no other authority may deny them that right. The Draft Board's function should be merely to determine whether or not in fact a person is recognized by his sect to be a minister, either by ordination or otherwise. The Board cannot concern itself with a person's qualifications.

It was, therefore, an impertinence for the panel to question petitioner in order to ascertain whether he was fit to be a rabbi and for the Board to give this matter any consideration whatever. The Circuit Court of Appeals recognized that a person's qualifications to act as a minister are immaterial, but upheld the inquiry into the qualifications as relevant on the issue of "the good faith and truth of the original claim of exemption" (190). That seems to us to be reasoning in a circle. If the qualifications of a person to act as a minister are immaterial to his right to exemption, they should not be inquired into at all. Otherwise no one can ever determine whether the inquiring agency based its conclusion on the irrelevant or the relevant factors. To say that the qualifications cannot be inquired into when it is admitted that the registrant is a functioning minister but can be inquired into when that is not admitted is a meaningless distinction. For the problem only arises when there is some question about the claim of exemption.

So with the questions dealing with petitioner's legal studies. Here also the inquiry was irrelevant. Neither the law nor the regulations require that a minister must, in order to be exempt, devote all his time to the practice of the ministry. The regulations merely require that a person "customarily" act as a minister. It was, no doubt, recognized that to allow exemption only where a person was acting exclusively as a minister would be a great hardship in many parts of the country. For it is well

known that ministers are often unable to live on what their congregations can pay them and must engage in other occupations. Thus from time immemorial ministers of all faiths have been teachers, lecturers, farmers, mechanics and even lawyers.

We do not mean to suggest that a board may never consider the extent to which the registrant actually pursues another calling. Such activity might indicate an abandonment of the ministry. But here petitioner had not pursued any other calling. He had merely studied law and sought admission to the bar. The fact that he was conducting legal studies was stated in his original questionnaire (7). It was not considered as a ban to his being exempted then. That he should have brought his legal studies to a completion could not in any way affect his continued right to exemption. Wholly impertinent were the questions as to petitioner's future intentions. If, after admission to the bar, petitioner had so conducted himself as a lawyer as to indicate an abandonment of his ministerial status it would have been, of course, appropriate for the Draft Board to have reconsidered his exempt status. No such occasion had arisen. It was, therefore, improper for the Board to consider petitioner's claim for exemption as a minister in the light of his application for admission to the bar.

In view of the impossibility of determining the extent to which these improper elements entered into the Board's determination here, the very least which the Court should have done was to have sent the case back to the Board with instructions that the Board reconsider petitioner's status without any regard to his having completed his legal training or to his alleged lack of qualifications. See *United States ex rel. Reel* v. *Batt*, 141 F. 2nd 845; *United States ex rel. Kornfeld* v. *Cain*, not yet reported, decided September 7, 1944, by Judge Abruzzo in the Eastern District of New York.

Petitioner's application for certiorari should be granted because the action of the Draft Board cannot be sustained on any possible reading of the evidence. Unless it is granted, petitioner will have been denied substantial justice.

POINT IV

The Draft Board improperly abdicated its functions to a panel not vested with any authority by law.

It is clear from a reading of the record here that the Draft Board in effect abdicated its function and let the panel determine the basic issue. This panel on theological qualifications, which was set up by the New York Selective Service Headquarters, was not authorized either by law or any regulations. That was conceded by Col. Durham who was in charge of the panel (59). According to him the purpose of the panel was to pass on various technical questions which might arise in the theological field "just as we use them in the medical field and in the occupational field and in the case of conscientious objectors" (56). Of course in the case of conscientious objectors there is a special hearings machinery set up by the law and regulations which has no parallel here.

Whatever justification there might be for setting up a panel on theological matters to deal with technical questions which might arise, there was no justification for doing what was done in the case at bar. A panel set up to deal with technical questions would be expected to give expert opinion on limited questions. Such a panel, for instance, might be called on to express an opinion with regard to the right of one rabbi to ordain another or with regard to the form of certificates of ordination. Moreover, in any case in which an advisory panel might be called upon to express an opinion it would be essential that such opinion be communicated to the registrant so that he could

have an opportunity of producing expert testimony of his own and of convincing the Local Board, which had the burden of decision, that his experts and not those on the panel were the better qualified to express an opinion. Nothing of the sort was done in the case at bar.

In the first place, the panel was not asked to answer any technical questions at all, nor did it purport to do so. While the panel set forth certain reasons for its action in a confidential statement dated November 17, 1943 (21), that memorandum was not known to the Draft Board at the time, or until March 20, 1944 (32). It was never seen by the Appeals Board (61, 62). The only information which the Draft Board received at the time it reclassified petitioner was a letter stating merely that the panel "voted unanimously to recommend that registrant's status did not warrant his classification in Class IV-D" (31). This communication was sent to the Local Board on November 24, 1943 (17). On December 9th (18) and without in the meantime communicating with petitioner (36) the Draft Board reclassified him and rescinded his exemption (18).

It is obvious from this sequence of events that the Draft Board did not consider that the panel was called upon to express its expert opinion for the guidance of the Board. The panel had expressed no opinion, the registrant had been advised of no such opinion. He had been given no opportunity to combat any opinion which might have been expressed. The Draft Board evidently considered that it was the panel's function to advise on the basic issue which the law confided to the Draft Board for its decision. We submit that the panel properly could have no such function. The panel should never have been asked to express any opinion with regard to a registrant's right to exemption. It should have been confined solely to the function of expressing its opinions on technical questions, opinions, moreover, which would be but part of the evidence of the case, with opportunity to the registrant to controvert them.

For failure to pursue this elementary principle of fair play the action of the Draft Board here must be set aside.

POINT V

The decision of the Draft Board was improperly sustained on the basis of material which was not before the Draft Board at the time it reclassified petitioner.

We have already called attention to the fact that in the draft file admitted in evidence were three papers not considered either by the Local Board or the Appeals Board. They consisted of the Emanuel report of November 17, 1943 (29), the Agress report of November 23, 1943 (31), and the panel's confidential memorandum (31). These papers were first placed in the file on March 20, 1944 (29, 31, 32), and were not before the Local Board at the time it reclassified petitioner (29-32). Nor were they ever before the Appeals Board (61, 62). Nevertheless, the Court denied motions to strike these papers from the record (31, 32, 62).

In his opinion, Judge Inch attempted to justify this action by the statement that the papers reached the Local Board before petitioner was actually inducted, so that the induction could have been prevented had the papers required that result (154)! Petitioner had been ordered on March 11, 1944, to report for induction on March 22nd (20); the papers reached the Local Board on March 20th (29, 31, 32). The only evidence that the Board reconsidered petitioner's status in the light of these papers is a letter dated March 21st which states that the matter was reviewed on the night of March 20th and no further action taken by the Board (179). There is no evidence that petitioner was informed of this intended action, that he ever saw the three papers or had any opportunity to rebut any statements in them which might appear to be adverse to his claim. Consequently the Board had no right in this underhand fashion and at the eleventh hour to support the action taken by it months before. See *Matter of Daley* v. *Board of Estimate*, 267 App. Div. (N. Y.) 592; *Newbrand* v. *City of Yonkers*, 285 N. Y. 164.

On no theory can an administrative determination be sustained by reference to material not considered by the administrative agency and which the person affected had no opportunity to answer. See *Morgan* v. *United States*, 304 U. S. 1.

The Circuit Court of Appeals (183) sustained the reception of these papers on the ground that they had been considered before petitioner's induction and that their gist was included in the panel minutes. The latter statement is not supported by the record; the former runs counter to the authorities cited to the Court and unless repudiated by this Court will have far reaching results in administrative law, results contrary to American notions of fair play.

It must be assumed that respondent, in offering the three documents (164, 168-175) intended to add something to the material already before the Court; otherwise there would have been no object in their being offered. And this assumption is borne out by the facts. For nowhere in the panel minutes (125-140) were there any references to the number of persons in the congregation as twenty to thirty (indeed petitioner there said the number was fifty-five [133]); nor was there any reference to the number of children in the Hebrew school. The only reference in the panel minutes was to the number of persons said by Mr. Emanuel to have been present on the night he said he was in the synagogue (135). Yet the Circuit Court recites as facts (182) the statements found in the Emanuel report alone that there were only ten pupils in the school and twenty to thirty members of the congregation. Moreover, the Emanuel report was the only source of the Court's statement that petitioner's father was still the "true rabbi" of the congregation (182) and that most of petitioner's interest "seems to have been in the law" (188). These "facts" were evidently considered sufficiently important for separate statement by the Circuit Court and were accepted as true, though based on vague hearsay. Yet the Emanuel report was not before the Draft Board when it made the order

here under consideration, nor before the Appeals Board that reviewed it. Moreover, petitioner was afforded no opportunity by the Board to controvert any of the statements contained in the Emanuel report.

It is clear, therefore, that the Circuit Court was in error in stating (183) that the panel's minutes contained the gist of the various documents objected to. These minutes contained only a passing reference to the Emanuel report (135), they obviously referred in no way to the panel's own memorandum which was made after the completion of the panel's hearings, or to the Agress report which was not made until November 23, 1943.

We submit also that the Circuit Court erred in sustaining the reception of these papers on the ground that they had been considered after the order to report for induction, which is the administrative action here being challenged. Unless that order rests on a valid classification, the order is void and detention by the Army illegal. The Circuit Court recognized that principle in *United States ex rel. Beye* v. *Downer,* 143 F. 2d 125, when it reversed an order dismissing a writ of habeas corpus because of premature classification.

In the case at bar the order to report for induction was made on March 11, 1944 (20). It rested on the re-classification of December 9, 1943 (18), confirmed on December 27th (18, 19), and upheld by the Appeal Board on February 16, 1944 (20). Nothing that happened thereafter can possibly be used to sustain petitioner's induction. It would be "sheer denial" of due process (*DeJonge* v. *Oregon,* 299 U. S. 353, 363) to permit a person to be deprived of his liberty (and that is the consequence of induction into the Army) on the basis of evidence received in secret after the determination which is the basis for the deprivation of that liberty. No belated receipt of material by a local board can retroactively validate improper action. No administrative tribunal has the right to act on evidence not shown to the person affected, evidence he has had no chance to rebut.

Moreover, the regulations (626.2-a, b; *supra*, p. 16) forbade any reconsideration of petitioner's classification on March 20, 1944, which was after petitioner had on March 11th been ordered to report for induction (20). The regulations permit the reconsideration of a registrant's status after the issuance of the notice to report for induction only in two situations, neither of which existed here. The matter can be reconsidered if the Local Board "specifically" finds that there had been a change in status due to circumstances over which the registrant had no control. There is here no claim that such change had occurred, nor was there any specific finding by the Board that it had. The other exception is conditioned upon the written request of either the Director of Selective Service or the State Director. No such written request was made in the case at bar. Consequently any suggestion that the Board reconsidered petitioner's status on March 20, 1944, on the basis of the material then for the first time brought to its attention must be discarded. Such act would have been a violation of the regulations.

The position taken by the Circuit Court on this subject strikes at the very heart of due process. How can this Court sanction so flagrant a denial of ordinary fair play?

CONCLUSION

It is respectfully submitted, therefore, that because of the important legal questions involved in this case which deal with the method of administering the Draft Law and also affect judicial review of other administrative decisions and because substantial justice has been denied petitioner in the courts below, this Court should grant the writ of certiorari which has been applied for.

Respectfully submitted,

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